

PUBLIC PROSECUTOR*a*

v.

MOHD TAJUDDIN AHMAD

HIGH COURT MALAYA, SEREMBAN

MOHD NOOR ABDULLAH J

b

[CRIMINAL REVISION NO: 43-2-96]

26 SEPTEMBER 1996

CRIMINAL PROCEDURE: Sentence - 'Shall be liable' - Whether words prescribe mandatory minimum prison sentence for rape - Whether Court can order binding over - Penal Code, s. 376

c

CRIMINAL PROCEDURE: Plea of guilty - Equivocal plea - Accused led to believe sentence on conviction did not involve imprisonment - Procedure Court should adopt

d

STATUTORY INTERPRETATION: Construction of statutes - Mandatory or directory - Whether words of statute indicate mandatory or discretionary sentence - Penal Code, s. 376

The accused was charged with statutory rape, pleaded guilty and was convicted. The Sessions Court Judge bound him over for good behaviour for three years in the sum of RM7,000 with one surety under s. 294 of the Criminal Procedure Code ('CPC'). Upon being informed of the case by a Member of Parliament, the High Court Judge called for a revision of the case. The issue in this revision was whether the accused was properly convicted on his plea of guilt and sentenced according to the law, ie whether a person charged with rape could be bound over for good behaviour or whether a prison sentence was mandatory.

*e**f***Held:**

[1] Under s 376 of the Penal Code, it is provided that 'whosoever commits rape shall be punished with imprisonment ... of not less than five years' The use of the expression 'shall be punished with' indicates a mandatory sentence as opposed to the expression 'shall be liable to' which indicates a discretionary sentence. The section also fixes a minimum sentence of five years.

*g**h*

[2] Having regard to the peremptory language of the legislation and the legislative policy manifest in the legislation and with reference to other legislation, the punishment for rape is imprisonment of not less than five years and that a binding over under s. 173A or s. 294 of the CPC was unlawful.

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- a* [3] However, the accused's plea of guilt was not unequivocal. He did not know the consequences of his plea as he was induced into believing that he would be bound over because: (i) at the time his plea was recorded, he had been remanded for eight months; (ii) other accused persons in similar circumstances had been bound over by the Sessions Court Judge; *b* and (iii) it appeared that the prosecution had indicated its acceptance of the binding over order if the Court were to so decide. The plea of guilt was therefore rejected and the case reverted to the Sessions Court Judge for a rehearing.

c [Binding over order set aside. Retrial ordered before Sessions Court Judge.]

Cases referred to:

Public Prosecutor v. Nordin bin Yusmadi [1996] 1 CLJ 1 (*fol*)

Public Prosecutor v. Man bin Ismail [1939] MLJ 207 (*refd*)

Public Prosecutor v. Leonard Glenn Francis [1989] 2 MLJ 158 (*fol*)

d *Datuk Yong Teck Lee v. Public Prosecutor* [1993] 1 MLJ 295 (*refd*)

Public Prosecutor v. Mohamed Nor & Ors. [1985] 2 MLJ 200 (*refd*)

Legislation referred to:

Arms Act 1960, s. 8(a)

Criminal Procedure Code, ss. 173A, 294, 297, 323, 384, 465

e Federal Constitution, Arts. 8, 10

Firearms (Increased Penalties) Act 1971, s. 8

Penal Code, ss. 298A, 375, 376

Police Act 1967, s. 27, 27A, 27(8)

Vagrants and Decrepit Persons Enactment (Cap 191), s. 3(a)

f **Other sources referred to:**

Criminal Procedure in Malaysia, Mimi Kamariah Majid

For the public prosecutor - Ab. Karim Ab. Rahman (Junaidah Abd. Rahman with him)

Amicus Curiae - Karpal Singh; M/s. Karpal Singh

g **JUDGMENT**

Mohd Noor Abdullah J:

- h* By a letter dated 20 July 1996 a member of Parliament drew my attention to a criminal case where an accused person was convicted of statutory rape of an underaged girl and was bound over for good behaviour by the Sessions Court Judge in Seremban. In the exercise of my revisionary powers I had called for and the Sessions Court had promptly sent up the record of proceedings pertaining to the case. I did so having regard to the recent judgment of K.C. Vohrah J in *Public Prosecutor v. Nordin bin Yusmadi* *i* [1996] 1 CLJ 1 where he held that it was wrong of a Sessions Court Judge

not to have imposed the minimum sentence of five years imprisonment for an offence of rape. *a*

The record of proceedings disclosed that the 22 year old accused person was charged with statutory rape of a young girl of 15 years and 11 months in a house in Tampin Jaya, Tampin on 19 July 1994 at 2.15 a.m.. He was produced and charged before the Sessions Court on 17 December 1994. He claimed trial to the charge and a bail was set at RM7,000 with one surety to secure his attendance at the trial fixed from 14-18 August 1995. On 6 June 1995 the accused was produced before the Sessions Court where he beseeched the Court to reduce the amount of the bail because his mother was old and destitute and his family too poor to provide sufficient security and that he had been remanded for six months. The learned Deputy Public Prosecutor objected because the accused had committed a serious offence the punishment for which is a minimum of five years imprisonment. The Judge refused the accused's application. *b*
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On 11 August 1995 three days ahead of the scheduled hearing the accused was produced before the Sessions Court Judge. He pleaded guilty to the charge, understood the nature and consequence of his plea, admitted the facts submitted by the prosecutor and thereupon he was convicted and bound over for good behaviour for three years in the sum of RM7,000 with one surety under s. 294 Criminal Procedure Code. *d*
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On these facts as disclosed in the record of proceedings and without more I had to consider the correctness, legality and propriety of the finding, sentence or order of the learned Sessions Court Judge, that is to say, whether the accused was properly convicted on his own plea of guilt and whether he was sentenced according to the law. *f*

Rape is defined under s. 375 of the Penal Code and is punishable under s. 376 thereof as follows:

376. Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping. *g*

It is observed that the punishment of "imprisonment" is preceded by the expression "shall be punished with" whereas the punishment of "whipping" is preceded by the expression "shall also be liable to". The legislature must have intended the expressions to mean differently and bear different consequences. It is also observed that the legislature, contrary to its practice normally to fix the maximum sentence has instead fixed the minimum sentence. *h*

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- a* The legislature has varying modes of indicating in any penal provision the type and extent of punishment to be meted out, whether an imprisonment or a fine or whipping or any combination. It also indicates its intention whether a particular sentence is mandatory or discretionary by the use of such expressions as “shall be punished with” or “shall be liable to” the former being mandatory and the latter discretionary.

- b* The policy of the law as regards most offences is to fix a maximum penalty which is intended only for the worst case and to leave to the discretion of the Judge the determination of the extent to which in a particular case the sentence awarded should approach to, or recede from, the maximum limit. The Judge is given a very wide discretion in choosing the appropriate sentence according to the principles of sentencing.

- c* In *Public Prosecutor v. Man bin Ismail* [1939] MLJ 207 Lord Aitkin held that the expression “shall be liable to imprisonment for six months” used in s. 3(a) of the Vagrants and Decrepit Persons Enactment (Cap. 191) gives the Court an absolute discretion to award a sentence of imprisonment or to deal with the accused under s. 294 of the Criminal Procedure Code and that if the legislature had intended the accused to be sent to prison it would have used the expression “shall be punished with imprisonment”.

- d* In *Public Prosecutor v. Leonard Glenn Francis* [1989] 2 MLJ 158 Edgar Joseph Jr. J held that the sentence of binding over the accused under s. 294 of the Criminal Procedure Code for an offence under s. 8 of the Firearms (Increased Penalties) Act, 1971 cannot be justified either in law or on principles and he therefore quashed the sentence. In that case the accused was charged firstly with unlawful possession of firearm under s. 8 of the Firearms (Increased Penalties) Act, 1971 and secondly with possession of 14 rounds of .38 special bullets without licence or permit under s. 8(a) of the Arms Act, 1960. The legislature uses the expression “shall be punished with imprisonment for a term which may extend to 14 years and with whipping with not less than 6 strokes” in s. 8 of the Firearms (Increased Penalties) Act, 1971 and the expression “shall, on conviction, be liable in respect of any such contravention to imprisonment for a term not exceeding seven years, or to a fine not exceeding ten thousand ringgit, or to both” in s. 8(a) of the Arms Act, 1960. The learned Judge imposed a sentence of 18 months imprisonment on the first charge and the mandatory whipping with six strokes of the rattan.

- e* In *Public Prosecutor v. Nordin bin Yusmadi* [1996] 1 CLJ 16 Dato’ K.C. Vohrah J stated that in relation to a charge under s. 376 of the Penal Code there can be no doubt that a term of imprisonment had to be imposed by the Judge on the accused and that the meaning of the words “shall be punished with imprisonment” in the section is clear and they connote that a term of

imprisonment has to be mandatorily imposed. In that event the learned Judge imposed a sentence of five years imprisonment, the mandatory minimum sentence for the offence. *a*

The learned Deputy Public Prosecutor invited me to refer to other statutory penal provisions namely ss. 27 and 27A of the Police Act 1967 and s. 298A of the Penal Code in order to determine the legislative intention with regard to sentence. Section 27 deals with the powers of the police to regulate assemblies, meetings and processions. The penal provision states: *b*

(8) Any person who is guilty of an offence under this section shall be liable on conviction to a fine of not less than two thousand ringgit and not more than ten thousand ringgit and imprisonment for a term not exceeding one year. *c*

(8A) Sections 173A and 294 of the Criminal Procedure Code shall not apply in respect of an offence under this section.

Section 27A deals with the powers of the police to stop certain activities carried out other than in a public place and the penal provision is exactly the same as sub-ss. (8) and (8A) of s. 27. *d*

It is observed that the legislature uses the expression “shall be liable to” and not “shall be punished with” and thereby indicates its intention that a Judge is given a discretion either to impose a fine or an imprisonment save that a fine if imposed shall not be less than two thousand ringgit or an imprisonment if imposed shall not exceed one year. *e*

A penal provision which confers a discretion to a Judge to impose either a fine or imprisonment or both confers also a discretion to deal with the accused under ss. 173A and 294 of the Criminal Procedure unless the contrary intention appears. Here the legislature indicates its contrary intention by providing that ss. 173A and 294 shall not apply. *f*

In *Datuk Yong Teck Lee v. Public Prosecutor* [1993] 1 MLJ 295 Dato Syed Ahmad Idid J dismissed an application for a declaration that sub-s. (8) of s. 27 is *ultra vires* Articles 8 and 10 of the Federal Constitution and commented that it is apparent that the two thousand ringgit floor limit imposed under s. 27(8) may be intended to keep Parliamentarians and Assemblymen on the floor in the august houses and keep them away from the streets. *g*

I now refer to s. 298A of the Penal Code which provides under sub-s. (1) that whoever does any of the acts enumerated in the sub-section “shall be punished with imprisonment for a term of not less than two years and not more than five years” followed by sub-s. (2) which states that ss. 173A and 294 Criminal Procedure Code shall not apply. The enacting formula is the same *h*

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- a* as that of s. 376 namely the use of the expression “shall be punished with imprisonment” without an option of a fine and limiting the minimum sentence and thereby indicating its intention manifestly clear. The punishment is a minimum of two years imprisonment and nothing less. The binding over provisions being the lesser punishment are not applicable. Sub-section (2) is
- b* superfluous and was an over reaction to the decision of the Supreme Court in *Public Prosecutor v. Mohamed Nor & Ors.* [1985] 2 MLJ 200.

- c* Section 298A(1) at the material time when *Public Prosecutor v. Mohamed Noor & Ors.* was decided contained provisions prior to the present amendment and it stated, “Whoever ... shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.” Since there was a discretion to impose an imprisonment or a fine or both that discretion included the discretion to deal with the accused under ss. 173A and 294. It would be otherwise if the legislature had followed Lord Aitken’s advice and used the expression “shall be punished with imprisonment for a term which may extend
- d* to three years” without the option of a fine or both. With great respect to the three eminent Judges in *Public Prosecutor v. Mohamed Nor & Ors.*, I think they did not feel disposed to interfere with the sentence of binding over imposed by the learned Judge of the High Court not because a mandatory imprisonment is no longer mandatory as Mimi Kamariah puts it in her book
- e* *Criminal Procedure in Malaysia* but because a mandatory expression of a term of imprisonment with a fine or both is not mandatory but discretionary and includes a discretion to bind over the accused under ss. 173A or 294 Criminal Procedure Code, otherwise any person convicted of an offence under ss. 297, 323, 384, 465 and a multitude of other offences in the Penal Code must suffer a term of imprisonment. The learned Judges did not interpret the
- f* meaning and effect of the expression “shall be punished with imprisonment” which expression is commonly and abundantly used in the Penal Code.

- g* The amendments to the various offences of criminal breach of trust which provide a mandatory minimum term of imprisonment and with whipping, and of theft of motor vehicle or its retention or disposal which also provide a mandatory minimum imprisonment and also a fine, intentionally omitted to include the exclusionary clause similar to sub-s. (8) of s. 27 of the Police Act or sub-s. (2) of s. 298A of the Penal Code. It is unimaginable for the prosecution to argue that the binding over provisions do apply.

- h* In conclusion having regard to the peremptory language of the legislation, the legislative policy of indicating its intention in the legislation and with particular reference to other legislation and the decision of the Court pertaining to such legislation I rule that the punishment for rape is an imprisonment of not less
- i* than five years and that a binding over under ss. 173A or 294 of the Criminal Procedure Code is unlawful. An accused properly convicted must suffer under

the wrath of the law. I may add that having regard to any extenuating circumstances or where the punishment is too harsh and disproportionate to the offence and offender under any given circumstances the discretion lies not with the Court but with the Public Prosecutor to withhold his consent to prosecute the offender. Such safeguard is entrenched in similar type of legislation.

After making such a ruling I called upon the accused if he had anything to say before I proceeded to sentence him to a minimum of five years imprisonment. The accused said that he did not know that the minimum punishment for rape is a mandatory imprisonment of five years. He said he was induced into believing that by pleading guilty to the charge he would be bound over. I was inclined to believe him. Perhaps he did not know the consequence of his plea. Although he was told the minimum punishment for rape is five years imprisonment he believed he could get away with a binding over. His plea of guilt was equivocal. I therefore rejected his plea of guilt and reverted the case back to the Sessions Court Judge to rehear the case. I was inclined to accept that the accused was induced into believing that if he pleaded guilty to the charge he would be bound over because at the time when his plea was recorded he had been remanded for eight months, secondly other accused persons in similar circumstances were bound over by the Sessions Court Judge in Melaka and thirdly the prosecution appeared from the low key presentation of the facts of the case to go along with a binding over if the Court so decides.

In the exercise of my revisionary powers I set aside the order of the learned Sessions Court Judge and directed that the accused be retried before him on a date to be fixed upon the same security.

Reported by Anne Khoo

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